

**Tronox Navajo Area Uranium Mines
Draft Settlement Funding Allocation Strategy
USEPA Tronox Allocation Workgroup¹
November 5, 2021**

I. Introduction

Two settlements (“2011 and 2015 Consent Decrees” or “Tronox Settlements”) in the Tronox Inc. Bankruptcy in the Southern District of New York and related litigation, provided USEPA with approximately \$900 million to address 54 Tronox Navajo Area Uranium Mines (Tronox NAUMs). Twenty of the mines are located in USEPA Region 6 (on private land in New Mexico outside of the Navajo Nation) and 34 in USEPA Region 9 (on tribal land within the Navajo Nation) (*see* map provided as Attachment 1). When USEPA first received this funding, the costs of investigation and cleanup of the mines were unknown. This resulted in uncertainty concerning whether the settlement funds would be sufficient to complete all tasks required under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*, to address the contamination at the 54 Tronox NAUMs. While final remedies have not been selected, USEPA investigations, analyses of alternatives and development of cost estimates have made it clear that the Tronox settlement funds will be insufficient to perform the required work. Consistent with the Tronox Settlements, USEPA has developed a draft funding allocation strategy with the goal of creating appropriate incentives for full funding by the remaining non-Tronox potentially responsible parties (PRPs), so that cleanup work can begin as soon as possible after response actions are selected. This memorandum describes the assumptions and considerations the USEPA Tronox Allocation Workgroup has utilized, as well as the resulting strategy and planned next steps. The memo is intended for distribution to regulatory stakeholders for their input. After regulatory stakeholder’s input has been considered, a final version of the allocation strategy will be provided to the USEPA Office of Inspector General, which initiated an audit in 2017 (see Attachments 2 and 3).

II. Background

The 54 Tronox NAUMs are located in the Grants Mineral Belt, which runs through both steep mesas in Arizona as well as flatter lands to the east in New Mexico. Mining occurred primarily in the 1940s through the 1970s. While Tronox’s predecessor Kerr McGee Corporation was the primary operator of the mines, USEPA has issued notice of potential liability to other parties, including other mining companies that operated the Sites and federal agencies that participated in leasing and incentivizing production of uranium ore. The non-Tronox PRPs include parties that are familiar with the issues presented because these parties have participated in discussions, settlements and in some cases litigation, regarding the responsibility for cleanup of other uranium mine sites in the Grants Mineral Belt.

¹ USEPA’s Tronox Allocation Workgroup includes members of USEPA’s Office of Mountains, Deserts and Plains (OMDP), Office of Superfund Remediation and Technological Innovation (OSRTI), Office of Emergency Management (OEM), Office of Site Remediation Enforcement (OSRE) and Regions 6 and 9.

III. Assumptions, Considerations and Funding Allocation Strategy

A. Assumptions

Insufficiency: A key assumption, based on investigations and cost analyses to date, is that the funds currently available in the Tronox Special Accounts (\$924 million with interest) will be insufficient to cover the full costs of cleanup for the 54 Tronox NAUMs. USEPA's work to date has shown that even if the least expensive options that might be protective were implemented, Tronox funding alone would be insufficient. Based on current estimates, USEPA expects the insufficiency of funds to be substantial. *See* Attachments 4 and 6.

Remedy/Cost Uncertainty: USEPA investigations of site conditions and the development response action options and associated cost estimates are ongoing for the 54 Tronox NAUMs. The total funding required for full cleanup of the 54 Tronox NAUMs will not be known with certainty for a relatively long period, most likely a decade or more.

Other Financially Viable non-Tronox PRPs: As detailed below, there are financially viable non-Tronox PRPs for all but three of the Tronox NAUMs that require additional response actions but federal agencies may also be liable at those three sites.

Maximize Non-Tronox PRP Incentives to Settle: Allocation of the Tronox settlement proceeds is needed to begin negotiations with the non-Tronox PRPs and to secure full funding for cleanup at all 54 Tronox NAUMs.

Avoid Pre-Decisional Actions: The Workgroup sought to avoid pre-decision assumptions and considered the range of alternatives that could potentially be selected to address the 54 sites. Given that there is an implementable protective regional waste repository option for Region 6, the Workgroup did not use the more expensive option of disposal of off-site licensed facilities for the R6 Tronox NAUMs. For Region 9, however, the option of licensed off-site facilities is still among options that the Workgroup found is likely to receive further consideration, even though regional repositories remain a possibility. While the use of this most expensive option in Region 9 remains the strong preference of the Navajo Nation, a decision has not yet been made. USEPA will make the final response action selections consistent with CERCLA, the NCP and other program guidance.

Impact on Non-Tronox PRPs: The Workgroup considered the need to ensure that the chosen strategy would be fair to both PRPs whose sites were addressed sooner, as well to those whose sites would be addressed later.

Fair, Reasonable, in the Public Interest and Consistent with the CERCLA/NCP: The allocation strategy needs to result in settlements with or orders to private parties that would be readily approvable and enforceable by federal courts.

B. Considerations

Expedite Cleanup: A key consideration for selecting the Allocation Strategy was expediting cleanup. While some sites had significant reclamation, impacted environmental justice communities have waited decades for final protective cleanups. Interim actions have reduced exposure, but uncertainty about the nature and timing of final cleanup has been disruptive for the affected communities. Finalizing a resource allocation as a basis for engaging the non-Tronox PRPs will allow USEPA to move promptly to fully fund and begin cleanups at the Tronox NAUM sites.

Minimize Funding Shortfall, including for Cleanup and Post-Removal Site Control: A second consideration, consistent with USEPA policy, is to ensure that PRPs fully fund the costs of cleanup.

C. Enforcement:

Based on prior litigation and settlements, the Workgroup is confident that enforcement against the known, viable non-Tronox PRPs will be successful. As noted above, the non-Tronox financially viable PRPs include former mine operators and federal agencies. An April 2019 federal district court decision (*El Paso Natural Gas v. U.S.*), regarding a group of 19 non-Tronox uranium mines in Western Navajo Nation, established that neither the mining company operators nor the federal agencies in that very similar case had successful defenses to CERCLA liability. None of the parties to that litigation appealed. *See* Attachment 5. In addition, in three settlements for other similar mine sites, between 2011 and 2018, the U.S. agencies and the mining companies agreed to contribution claims against the United States for roughly 25% - 50% of total response costs. These settlements provide additional assurance that enforcement against the non-Tronox PRPs will be successful.

IV. Funding Allocation Strategy

Proportional Funding/Bankruptcy Claims Model: The proportional allocation strategy the Workgroup developed is similar to a bankruptcy court approach and is appropriate given that the Tronox assets are insufficient to pay all claims. The Workgroup selected this approach because it met the criteria described above.

Equal Percentage of Capital Costs: For sites with viable PRPs, the Workgroup selected having the Tronox Settlement fund an equal percentage of capital costs at each mine or mine grouping. Non-Tronox PRPs would pay 100% of all costs exceeding their share of the allocated Tronox settlement funds (*see* Attachment 6).

V. Conclusions

Based on the factors discussed above, the Tronox Allocation Workgroup has proposed the draft Tronox Settlement Funding Allocation Strategy for regulatory stakeholder review and input. At an October 13, 2021 virtual meeting, USEPA met with representatives of Navajo Nation EPA and State of New Mexico agencies and requested their input. A follow-up meeting with regulatory stakeholders is scheduled for November 9, 2021. The OIG deadline for USEPA to complete the funding allocation strategy is December 31, 2021. The OIG deadline for USEPA to complete the final resource allocation is May 31, 2022 (*see* Attachment 3 at p. 5).

VI. Attachments

1. Map showing location of Tronox NAUMs
2. OIG Audit Report 2018
3. Regions 6 and 9 Report to OIG, dated December 29, 2020
4. Tronox NAUM Cost Estimate Table
5. *El Paso Natural Gas v. United States*, No. CV14-8165-PCT-DGC, (D. Ariz. April 16, 2019) (<https://casetext.com/case/el-paso-natural-gas-co-v-united-states-9>)
6. Tronox Allocation Strategy PowerPoint shared with Navajo Nation and New Mexico, October 13, 2021